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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1031

LEONARD TONASKET,
Appellant,

v.

THE STATE OF WASHINGTON and
THE SUPERVISOR OF THE TAX COMMISSION
OF THE STATE OF WASHINGTON,
Respondents.

MOTION FOR ORDER REQUIRING BRIEFS UPON THE ISSUE OF JURISDICTION

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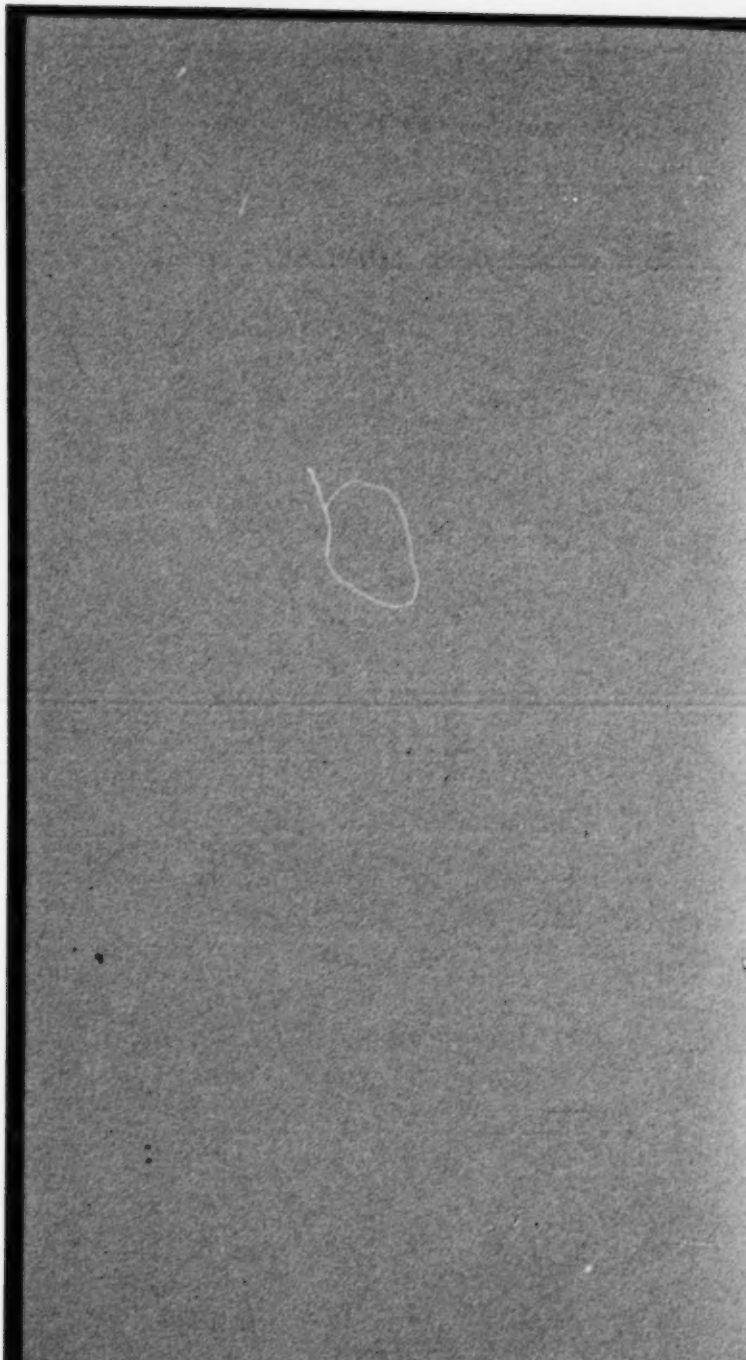

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Counsel for the seven Amici Indian Tribes and counsel r the National Congress of American Indians have raised their briefs the serious jurisdictional question of whether e State of Washington has ever validly assumed Indian risdiction under the express terms of Public Law 83-280.

Since that question was not raised by appellant's former unsel in the trial court, counsel for appellant felt him-lf precluded by familiar principles of appellate law from ising it in the Supreme Court. However, at the time of al argument in this case, on December 12, 1972, three stices of the Supreme Court questioned appellant's coun-l upon the point. Because of the Supreme Court's justi-

fied interest in this very serious question and especially in light of the newly-discovered legislative history of Public Law 83-280, it is both appropriate and necessary to the Supreme Court's decision in this matter that an order be issued requiring the parties to submit additional briefs upon the issue of jurisdiction.

Despite the clear language of its Enabling Act and Constitution, both precluding the State of Washington from Indian jurisdiction without the consent of Congress and of "the people" of the state, Washington failed to follow the express mandate of Congress in Section 6 of Public Law 83-280, which specifically requires amendment of the state constitution prerequisite to assumption of Indian jurisdiction. Instead, Washington proceeded to assume Indian jurisdiction by simple legislative enactment. The Washington Court attempted to validate the legislative assumption of Indian jurisdiction upon the basis of an equation that "consent of the legislature is consent of the people. "*Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969), appeal dismissed, 397 U.S. 16 (1970). The 9th Circuit Court of Appeals ruled in the same manner in *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (1966), *cert. den.*, 387 U.S. 907 (1967).

But neither the Washington Court nor the 9th Circuit Court of Appeals had the benefit of consideration of the newly-discovered legislative history of Public Law 83-280 or the Supreme Court's decision in *Kennerly v. District Court of 9th Judicial District of Montana*, 400 U.S. 423 (1971).

In *Kennerly*, the Supreme Court refused to uphold the Supreme Court of Montana which ruled that Montana had

validly taken jurisdiction over the Blackfeet Reservation. The Supreme Court held that strict compliance with the provisions of Public Law 83-280 is required and pointed out that:

> "The statute is illustrative of the *detailed regulatory scrutiny* which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country." (Emphasis Supplied) 400 U.S. at 424, n. 1.

The Supreme Court further pointed out that Congress' specific provisions governing state assumption of Indian jurisdiction was no "idle choice of words", 400 U.S. at 427.

The newly-discovered legislative history of Public Law 83-280, demonstrates that the interpretation of Public Law 83-280 by the Washington Court and the 9th Circuit Court of Appeals is clearly invalid. In the Hearing on HR 1063 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 83rd Congress 1st Sess. (June 29, 1953), Congressmen from states with large Indian populations discussed with Mr. Harry Sellery, Chief Counsel, Bureau of Indian Affairs, and Mr. William R. Benge, Chief, Branch of Law and Order, Bureau of Indian Affairs, the manner in which the various states would be able to assume Indian jurisdiction under the proposed Public Law 83-280.

In referring to those states with constitutional prohibitions against Indian jurisdiction (namely, Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington), Mr. Benge pointed out to the Subcommittee that Section 6 of the proposed Public Law 83-280 would require amendment to the state con-

stitutions and that the act was framed both as an amendment to the enabling acts of the states and as authority by Congress for the states to amend their constitutions. Subcommittee Report, p. 23, ll. 16-25, p. 24, ll. 1-2.

Congress' understanding of the need for constitutional amendments for those states was succintly and precisely stated by Congressman Wayne Aspinall as follows:

> "Mr. Aspinall. The State Legislature would not do it. The people of the state themselves would have to do it." Subcommittee Report, p. 24, ll. 3-4

Again, in the Hearing on HR 1063 Before the Committee on Interior and Insular Affairs, House of Representatives, 83rd Congress, 1st Sess. (June 15, 1953), Mr. Abbott, Counsel to the Committee who had participated in the earlier Subcommittee Hearing, reported to the Committee that:

> "The bill does not as acted upon by the committee make provision for eight states which have constitutional organic impediments for accepting state jurisdiction. The enabling act for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and *Washington* provided that exclusive Federal jurisdiction would be retained." (Emphasis Supplied) Committee Report, p. 2, ll. 22-25, p. 3, ll. 1-3.

Mr. Abbott then reported:

> "The two additional section amendments would apply first [Section 6] to the eight states having constitutional or organic law impediments and would grant consent of the United States for them to remove such impediments and thus acquire jurisdiction.
>
> "The other amendment [Section 7] would apply to any other Indian states, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction." Committee Report, p. 4, ll. 6-14.

Thus it is beyond question that Section 7 of Public Law 83-280 authorized *only* those 15 or 18 states without organic law impediments to assume Indian jurisdiction by simple legislative enactment. But Section 6 of Public Law 83-280 which applied to the eight states with organic law impediments is more complicated. It authorized the eight states to amend where necessary their "state constitutions or existing statutes" prerequisite to assumption of Indian jurisdiction. The second half of that disjunctive proviso ("constitution or existing statutes") applied *only* to South Dakota and North Dakota whose constitutions require simple legislative enactment prerequisite to assumption of Indian jurisdiction. But the first half necessarily applied to Arizona, Montana, New Mexico, Oklahoma, Utah and *Washington* and *required* constitutional amendment. Consequently, Washington could not assume Indian jurisdiction by legislative enactment alone.

Congress' intent with respect to Washington is made clearer by the following testimony of Mr. Abbott:

> "At any other time in the future that the state of Washington or South Dakota is able to remove their constitutional impediments, then they could so do it." Committee Report, p. 7, ll. 20-22.

Finally, any remaining doubt disappears with the testimony of Congressman Alfred J. Westland of Washington who testified:

> "Mr. Westland. I believe the state of Washington was consulted on this matter and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned, *but they do have a constitution there that requires this amendment in order that they can get at it.*" (Emphasis Supplied). Committee Report, p. 8, ll. 4-9.

But Washington did not amend its state constitution to assume Indian jurisdiction as required by the "detailed regulatory scrutiny" of Congress in Section 6 of Public Law 83-280. The result is that Washington has no valid jurisdiction over appellant upon which to predicate taxation of his business activities on the Colville Indian Reservation.

For these very important reasons, appellant moves that the Supreme Court issue an order requiring the parties to submit additional briefs upon the issue of jurisdiction.

Respectfully submitted,

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ROBERT L. PIRTLE
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December 20, 1972